HASSAN MAT SAMAN

v.

TENGKU MAT ENGKU NIK & ORS.

HIGH COURT MALAYA, KOTA BHARU
ABDUL RAZAK J
[CIVIL SUIT NO. 132 of 1972]

TORT: *Third party action - Road accident between military truck and taxi - Third party against the Government of Malaysia and the driver of the truck - Contribution and or indemnity - Evidence - Whether truck encroached on to path of taxi - No evidence called by third parties - Sketch plan - Percentage of contributory negligence - Third party invoked statute of limitations - Whether defendant barred - Position in law - Quantum of damages.*

This is an action for damages for negligence arising from a road accident between a military truck and a taxi. The plaintiff, a passenger in the taxi, suffered injuries. Subsequent to the action by the plaintiff, there was an action by the defendants against the third parties. The Government of Malaysia and the driver of the Military Truck, for contribution and or indemnity.

The evidence of the taxi driver, the second defendant was that the military truck encroached into his path. The third parties elected not to call any evidence. A sketch plan was produced in the agreed bundle.

It was the contended that as the plaintiff had no case against the defendant, the action against the third parties should also fail. The third parties also invoked the statute of limitations and said that the action being more than 12 months after the cause of action had accrued, the defendant was therefore barred from proceeding against them (3rd parties).

In deciding quantum, the Court had to take into consideration the injuries sustained by the plaintiff:

1 Abrasion 1" over the right frontal region of the forehead.

2 For abrasions over the right side of face, with 1" abrasion over bridge of nose.

3 2" deep laceration over the right upper arm with exposed fracture (compound fracture) with considerable amount of bleeding.

4 Laceration 2" over right elbow.

The plaintiff was a rubber tapper earning RM6 per day. He was in hospital for 29 days. The Court in assessing loss of income noted that the monsoon season had almost set in at that time.

Held:

[1] The truck was entirely to blame for the accident.

[2] The Court adopted the view that the cause of action accrues against the third party only on the finding of liability against the defendant.

[3] On the principle laid down in *Croston v. Vaughn* the third party is liable to the extent of 80%.

[4] *Quantum*

The Court awarded a sum of RM6,500 for general damages, considering the authorities and bearing in mind that the medical report did not say whether the injuries are permanent or whether there any residual effects.

The Court Awarded

General Damages	RM6,500
Special Damages	RM 145

[5] The payment shall proportionately be divided between the third party in the sum of RM1,300 and RM5,200 for the general damages and RM29 and RM116 for the special damages.

[6] Interest at 6% from the issue of the writ till judgment on the general damages and 3% from the date of accident till judgment on the special damages and there will be cost for the plaintiff against the defendant.

[7] The 3rd party shall bear the cost of the defendant proportionately.

Cases referred to:
Hordern Richmond Ltd. v. Duncan [1947] 1 All ER 427
Harvey v. R.G. O'Dell Ltd. & Galway [1958] 2 QB 78
Morgan v. Ashmore [1953] 1 All ER 328
Merlihan v. A.C. Pope, Ltd. [1945] 2 All ER 449
Croston v. Vaughan [1937] 4 All ER 249

Legislation referred to:
Civil Law Ordinance 1956, ss. 8(3), 10(1)(c)
Law Reform (Married Women and Tortfeasors) Act 1935 [UK], s. 6(1)
Law Reform (Miscellaneous Provisions) Act 1934, s. 1(3)
Limitation Act 1939 [UK], s. 6(1)

For the plaintiff - Foo Say Ghee; M/s. Foo Say Ghee & Co.
For the defendants - R.J. Manecksha; M/s. Lim Ewe Hock & Co.
For the 3rd parties - Abu Talib bin Othman

JUDGMENT

Abdul Razak J:

This is an action for damages for negligence arising from a road accident between a Military truck and a taxi. The plaintiff was a passenger in the taxi who suffered injuries. There was subsequent to the action by the plaintiff an action by the defendants against the third parties, the Government of Malaysia and the driver of the Military truck for contribution and or indemnity.

The plaintiff said that on the day in question he went to Tanah Merah in the second defendant's taxi when at Batu Empat there was an accident. He was in the rear seat. He did not know how the accident happened. But he knew the taxi driver did not apply his brakes or sounded the horn. The car travelled at about 30 miles per hour. The taxi driver, 2nd defendant, said the collision took place at a bend.He was travelling at 25 to 30 miles per hour. He was negotiating the bend when he saw the Military truck moving in the opposite direction. He saw the truck about 10 yards from him. The truck came and encroached to his side and hit his vehicle. He swerved to the grass verge. He admitted he did not apply his

brakes or horn the car. In cross-examination he was asked why he said at the lower Court that he saw the truck about 30 yards away. He said he could not remember having said it. He had no time to apply his brake or to horn. If he applied his brake the car would have overturned. It was a blind bend and a sharp one.

The third parties elected not to call any evidence. A sketch plan was produced in the agreed bundle.

Looking at the sketch plan it seems to support strongly the taxi driver's evidence that the Military truck was taking the wrong side of the road at the time of the collision. There are brake marks marked 'M' & 'O' running to the rear and directly in line with the off-side rear tyres of the truck. The truck stopped well on its wrong side. The inference was that it had moved forward after the impact. The point of impact must therefore have been somewhere between 'M' and 'O'. 'O' is only 5' 11" to the right side of the road as the taxi faced it. The road is about 19' 9". The collision was at the bend. The plan seems to be consistent with the driver's story that it was a blind bend. The taxi had in other words only 5' 11" gap to squeeze through and having to see the truck the first time after the blind bend completely on the wrong side, I do not think any driver could have escaped being run down by the truck. In the circumstances I hold therefore the truck entirely to blame for the accident.

It is urged by Counsel for the third parties and conceded by Counsel for the plaintiff that if the taxi was completely free from blame then the plaintiff has no case against 1st and 2nd defendants, the owner and driver of the taxi. It follows it is contended by the third parties that the action against them would also fall to the ground. That must in my view be the position. To make the third party liable nevertheless is to render him liable as if he had been sued directly by the injured party when he was not. The third party was brought in, in order to call upon him to make contribution or indemnity if the defendant was found to be liable. Since the defendant is not,in my view, liable the third party is also not liable. Cassels J in *Hordern Richmond Ltd. v. Duncan* [1947] 1 All ER pp. 427, 430, was also of this view.

The plaintiff's action against the defendants is therefore dismissed with costs and the defendants shall pay the costs of the third parties.

My above judgment is based on the premise that the bend was a blind bend. If I am found wrong on this finding and therefore the taxi driver could have seen the truck sometime before the accident to enable him to take some evasive action and that he could not have done so because he was travelling fast, then I would hold that the taxi driver was 20% to blame for the accident and the truck 80% . Against this the third party however had set out what appears to me to be quite a formidable defence, if only because it seems to me the authorities have never truly resolved the point. The 3rd party invoked the statute of limitation and said the action being more than 12 months after the cause of action had accrued (that is after the injury to the plaintiff) the defendant was barred from proceeding against them. There is an apparent lack if not absence of local authority on this point. Counsel for the defendant had urged me to say that the third party would not be protected by the statute i.e., the Public Authorities Protection Ordinance and referred me to the case of *Harvey v. R.G. O'Dell Ltd & Galway* [1958] 2 QB p. 78 to say by analogy that although there the third party had set up the defence of limitation under s. 1(3) of the Law Reform (Miscellaneous Provisions) Act 1934 (which is *pari materia* with our s. 8(3) of the Civil Law Ordinance) on the ground that the action was taken more than 6 months after the deceased's personal representative had taken out representation, the Court had nevertheless held that the defendant was not barred from proceeding against the third party. Section 1(3) reads:

No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either:

(a) proceedings against him in respect of that cause of action were pending at the date of his death; or

(b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

I do not think, with respect, I need to follow this argument further simply because I feel the relevance of s. 1(3) is really not to the point here since the section relates specifically to proceedings against the estate of a deceased person. But the action by the defendant against the 3rd party in our case is not against the estate of a deceased person. To that extent the principle laid down is not applicable. Does that necessarily therefore defeat the defendant's action against the third party. I do not think it would be so. Cases had tended to show that even in non-fatal accident cases involving third parties seeking the aid of the Limitation Act 1939 (which is *pari materia* with the Public Authorities Protection Ordinance) the Court had leaned against saying that they were protected. The ratio decidendi of those decisions is that the action against the third party being a separate action for contribution or indemnity cannot be equated with the action which the injured party directly brings against one or the other tortfeasor and the time rule which applies to the defendant would not necessarily therefore apply to the third party. The underlying basis of the argument is that s. 6(1) of the Law Reform (Married Women and Tortfeasors) Act 1935 (which is *pari materia* with s. 10(1)(c) of the Civil Law Ordinance) which reads:

Where damage is suffered by any person as a result of a tort ... (c) any tortfeasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise ...

gives the defendant the right of contribution against the third party and that right cannot be cut down merely by the plaintiff's laches in bringing his action. They say therefore the cause of action against the third party must be deemed to have accrued only on the judgment being held against the defendant. There is a consensus of view that it would be highly unjust and unfair on the defendant if the injured chooses to sue him only after the period of limitation against third party had lapsed leaving him (the defendant) remediless against the third party for contribution if he (the defendant) should be found to be liable. It was along those lines that the Court in *Hordern Richmond Ltd. v. Duncan* [1947] 1 All ER, *Morgan v. Ashmore* [1953] 1 All ER p. 328 and *Harvey v. R.G.O'Dell Ltd.* (cited above) held that the defendant was not prevented nevertheless from going against the third party for contribution. *Merlihan v. A.C. Pope Ltd.* [1945] 2 All ER p. 449 seems to be the only case which went the other way, to view the Limitation Act 1939 as barring action against the third party after due time. But Birkett J's judgment for holding the third party not liable was, if I may say so, rather puzzling and strange. At the outset he seemed to have accepted the third party's contention that the words "in time" should be inserted after the words "who is, or if sued" in s. 6(1). And therefore he held that since the defendant had not sued the third party in time his action against the latter failed. But strangely, he went on to say at the end of his judgment that "This statute (referring to s. 6(1) as it stands and as it is worded, ought not to have added to it 'who if sued in time would have been liable' "which makes one wonder whether he had read the s. 6(1) with the words "in time" in it which had brought about his conflicting decision. All things considered, I am inclined to adopt the view therefore that the cause of

action accrues only on the finding of liability against the defendant. It is the only construction which will ensure that fairness & justice is done to all parties. Otherwise, it would mean that the defendant's right to contribution from the third party would depend entirely on the whims of the plaintiff. And the defendant would have to seek for a declaration each time from the Court to say whether the third party would be liable to contribute in the event that he (the defendant) is found to be liable to the plaintiff, even before the action is brought against the defendant. That would indeed be creating an inconvenient situation. I would therefore hold on the principle laid down in *Croston v. Vaughan* [1937] 4 All ER p. 249 the 3rd party liable to the extent of 80%:

> I would now come to the question of quantum. The plaintiff had the following injuries:
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> 1. Abrasion 1" over the right frontal region of forehead.
> 2. Few abrasions over the right side of face, with 1" abrasion over bridge of nose.
> 3. 2" deep laceration over the right upper arm with exposed fracture (compound fracture) with considerable amount of bleeding.
> 4. Laceration 2" over right elbow.

Considering the authorities cited and bearing in mind that the medical report does not say whether the injuries are permanent or whether there are any residual effects I would award a sum of RM6,500 for general damages. On the special damages the plaintiff withdrew the claim for RM200 for extra food and nourishment. The plaintiff said he earned about RM6 per day as a rubber taper. He was in hospital for 29 days as evidenced by the medical report. This was not challenged. However, considering the monsoon having almost set in at that time, I would therefore award a sum of RM5 per day for loss of income. That would make the loss of income to be RM145. There will be an order therefore for the following award: General Damages RM6,500, Special Damages RM145. The payments shall proportionately therefore be divided between the defendant and the third party in the sum of RM1,300 and RM5,200 for the general damages and RM29 and RM116 for the special damages. There will be an order for interest at 6% from the issue of writ till judgment on the general damages and 3% from the date of accident till judgment on the special damages. There will also be cost for the plaintiff against the defendant. The 3rd party shall bear the cost of the defendant proportionately.

Also found at [1990] 2 CLJ 1136